United States Senate

WASHINGTON, DC 20510

November 18, 2011

The Honorable Eric Holder Attorney General Us Department Of Justice 950 Pennsylvania Avenue, Nw Washington, D.C. 20530-0001

Dear Mr. Attorney General:

Members of Congress have been trying to determine whether Justice Elena Kagan has a conflict of interest with respect to participating in litigation in the Supreme Court challenging the constitutionality of the Patient Protection and Affordable Care Act (PPACA) due to her involvement with and support for this legislation while a member of the Justice Department. Unfortunately, your Department has rejected all Congressional oversight requests for information about her role in the Obama Administration's defense of this law. You recently told the Senate, incredibly, that you were not even aware of Congressional requests on this topic, and that your Department handled her duties as it relates to such matters in a way that is belied by the facts, namely that you physically removed her from all meetings discussing the litigation. Because of the highly questionable manner in which your Department is handling this important issue, we write to underscore the importance to the rule of law of an informed resolution of this question, and to apprise you of the legal and factual bases for our concerns.

Federal law requires recusal from a case if a judicial officer of the United States "has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case or controversy." 28 U.S.C. § 455(b)(3). In addition, a federal judge must disqualify herself from participating in a matter if her "impartiality might reasonably be questioned." *Id.* at § 455(a). It appears that former Solicitor General Kagan's participation in the Obama Administration's defense of the PPACA may satisfy both requirements for recusal.

Then-Solicitor General Kagan acknowledged to the Senate Judiciary Committee last year that, in fact, she played a "role" in the Obama Administration's defense of the PPACA, including attending "at least one meeting" that discussed the litigation. But she minimized her degree of involvement in the litigation, characterizing it as not "substantial." Federal law, however, requires recusal if a government official participated in a matter that is the subject of litigation; it does not require the government official's past participation in that same matter to be "substantial" (as determined by the self-same government official).

Moreover, emails finally produced by your Department in response to lawsuits to enforce the Freedom of Information Act suggest involvement by then-Solicitor General Kagan in the Administration's preparations for defending the PPACA. In January 2010—two months before then-General Kagan was even aware she was being considered as a potential nominee to the Supreme Court—your Department began planning to defend this law against legal challenges. Neil Katyal, Ms. Kagan's principal deputy, stated he would "speak with Elena" about her office participating in a Department working group that would plan the Administration's litigation strategy, exclaiming that he wanted the Administration to "crush" those challenging the PPACA. A few hours later, Mr. Katyal indicated that he had spoken with Ms. Kagan about the legal working group, and said she "definitely" wanted her office to participate in it. ("Elena would definitely like OSG [Office of the Solicitor General] to be involved in this set of issues.") He said the working group would "bring Elena in as needed." A few days later another member of your Department made clear that the working group would discuss the legal "claims that will be asserted and how [the Obama Administration] will defend against them." This email then listed the major legal issues that likely would arise in legal challenges to the PPACA over which the working group would deliberate. (Your Department has redacted that part of the email: "The big areas of possible litigation are [redacted].") Mr. Katyal then underscored that Ms. Kagan's office was to be "heavily involved" in planning the Administration's legal strategy "even in the d[istrict court]."

In March—two months before then-Solicitor General Kagan was nominated to the Supreme Court—she was party to a discussion involving the head of the PPACA litigation defense working group (Associate Attorney General Thomas Perrelli) and Mr. Katyal. Specifically, Mr. Katyal added Ms. Kagan to an email discussion with Mr. Perrelli so Mr. Katyal could advise her of a draft litigation complaint challenging the PPACA. Mr. Katyal raised particular parts of the complaint with Ms. Kagan and Mr. Perrelli, including his analysis of the plaintiff's litigation strategy. He also provided a link to a website so Ms. Kagan and Mr. Perrelli could review the document themselves. Mr. Katyal then recommended to them the next steps the Justice Department should take to respond to this upcoming legal challenge. He specifically noted that he was now including then-Solicitor General Kagan to apprise her of his recommendation, presumably so she could express any disagreement with it ("I haven't discussed this with Elena, but am ce'ing her here"). It should be noted that according to then-General Kagan's own testimony to the Senate Judiciary Committee, during the time of this discussion of a particular legal challenge to the PPACA, she was still performing her duties as Solicitor General as normal.

Just three days later, then-Solicitor General Kagan expressed her glee to another member of your Department, Legal Advisor and Law Professor Larry Tribe, about the PPACA's likely passage in the Congress. In an email entitled, "fingers and toes crossed today!", Ms. Kagan happily says to Professor Tribe, "I hear they have the votes, Larry!! Simply amazing." Professor Tribe then gives Ms. Kagan his view of a recent modification to the legislation. ("So health care is basically done! Remarkable. And with the Stupak group accepting the magic of what amounts to a signing statement on steroids!")

Page 3 November 18, 2011

President Obama chose to nominate a member of his Administration to the Supreme Court knowing it was likely that, if confirmed, she would be in a position to rule on his signature domestic policy achievement—"litigation," Mr. Katyal noted to former Solicitor General Kagan, "of singular importance" to the Administration. Among other involvement in this matter, it appears that she was privy to discussions of legal claims and litigation strategy concerning court challenges to the PPACA. And it is apparent that she herself enthusiastically supported this legislation as a member of the Administration which is now defending it. When a former member of the Administration is in a position to rule on litigation in which she apparently had some involvement and which concerns legislation she herself supports, public confidence in the administration of justice is undermined. Your Department's refusal to provide information to the Congress that could eliminate this apparent conflict of interest only undermines that confidence further.

The Justice Department noted at the time the Congress was considering the current mandatory recusal law for federal judges that a purpose of its stricter standards was to avoid the possibility "that public confidence in the federal judicial system may be weakened." We urge you to reconsider your Department's decision not to respond to Congress's oversight requests so that the public can have confidence in the resolution of this important litigation.

Sincerely,

MITCH McCONNELL

REPUBLICAN LEADER

JON KYL

REPUBLICAN WHIP

CHUCK GRASSLEY RANKING MEMBER

SENATE JUDICIARY COMMITTEE

MIKE LEE

UNITED STATE SENATOR

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